

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-2114

To be argued by
DAVID PATTERSON

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2114

VASILIOS GIAMBANIDIS,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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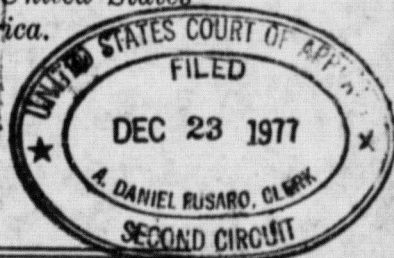


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—v.—

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Preliminary Statement

Vasilios Giambanidis appeals from an order filed in the United States District Court for the Southern District of New York on June 15, 1977, by the Honorable Kevin T. Duffy, United States District Judge, denying his motion to vacate his sentence pursuant to Title 28, United States Code, Section 2255.

Indictment 74 Cr. 217, filed March 4, 1974, charged Giambanidis and three co-defendants in six counts with bank robbery and the use of a dangerous weapon in committing bank robbery in violation of Title 18, United States Code, Sections 2, 2113(a) and (d). The six counts covered three armed bank robberies committed in the Southern District of New York in December of 1971, June of 1972 and October of 1973. The Indictment alleged that \$39,231 was taken in the December, 1971, armed robbery, and that \$58,658 was taken in the Octo-

ber, 1973, armed robbery. The Indictment did not allege the amount taken in the June, 1972, armed robbery.

On March 25, 1974, Giambanidis appeared before the Honorable Arnold Bauman, United States District Judge, and entered guilty pleas to Counts Four and Six, which charged violations of 18 U.S.C. § 2113(d)—armed bank robbery in June of 1972 and October of 1973.

On April 4, 1974, Indictment 74 Cr. 337 was filed in the Southern District of New York. This indictment had previously been filed in the District of New Jersey, and transferred to the Southern District of New York pursuant to Fed. R. Crim. P. 20. It charged Giambanidis and two co-defendants in eight counts with a total of four armed bank robberies. The robberies were alleged to have been committed in New Jersey in July of 1972, February of 1973, June of 1973 and September of 1973, each robbery giving rise to one count each of violations of 18 U.S.C. §§ 2113(a) and (d). The amounts alleged to have been taken in these robberies were \$25,830, \$72,582, \$135,180, and \$25,732, respectively.

On April 10, 1974, Indictment 74 Cr. 372 was filed in the Southern District of New York. This was an indictment transferred from the Eastern District of New York pursuant to F. R. Crim. P. 20. It charged Giambanidis and two co-defendants in three counts with an armed bank robbery committed in that district in April of 1973, and alleged that \$29,673 was taken.*

On April 15, 1974, Giambanidis appeared again before Judge Bauman. At this time he pleaded guilty to

* In each of the eight bank robberies charged in these indictments, Giambanidis was alleged to have acted in concert with on or more of the following co-defendants: Costantino Christodoulou, Eric Miller and John Niccalla.

two counts of Indictment 74 Cr. 337, charging him with the use of a dangerous weapon in the second and third of the New Jersey robberies. He also pleaded guilty to one count of Indictment 74 Cr. 372, charging him with the use of a dangerous weapon in the Eastern District robbery.

At this same proceeding on April 15, 1974, Giambanidis was sentenced under all three indictments. He received concurrent prison terms of 15 years on each of the five counts to which he had pleaded guilty.*

On May 24, 1977, Giambanidis filed a *pro se* motion pursuant to 28 U.S.C. § 2255 to vacate the sentences imposed on him under Indictments 74 Cr. 217, 74 Cr. 337, and 74 Cr. 372. The motion was treated as three separate motions, each directed at the sentences imposed under one of the three indictments. Since Judge Bauman had resigned, the motions were assigned to Judges Duffy (motion 77 Civ. 2555 relating to indictment 74 Cr. 217), Morris E. Lasker (motion 77 Cr. 2554 relating to Indictment 74 Cr. 372), and John M. Cannella (motion 77 Civ. 2556 relating to Indictment 74 Cr. 337). On June 15, 1977 Judge Duffy denied by order motion 77 Cr. 2555, from which denial Giambanidis now appeals. Motions 77 Civ. 2554 and 2556 remain pending.

Giambanidis is presently confined in the United States Penitentiary in Lewisberg, Pennsylvania.

* Giambanidis subsequently filed three separate motions that were treated as motions for corrections or reduction of sentence under Fed. R. Crim. P. 35. These were denied by Judge Bauman on June 14, 1974, and by the Honorable Kevin T. Duffy, United States District Judge, on September 10, 1974 and December 11, 1974.

Statement of Facts

Giambanidis contends that his five concurrent fifteen year sentences were unlawfully imposed because insufficient consideration was given by the sentencing judge to the possibility of treating him as a "youth offender" under the Federal Youth Corrections Act. 18 U.S.C. § 5005 *et seq.* Giambanidis was born on February 3, 1951, and was therefore 23 years old at the time of his convictions. Thus he was a "young adult offender" within the meaning of 18 U.S.C. § 4216, but not a "youth offender" within the meaning of 18 U.S.C. § 5006(d).

At the time of sentencing, Giambanidis' attorney spoke briefly in his behalf. The attorney represented to the Court that Giambanidis had committed a total of ten bank robberies and conceded that it was "very hard . . . to plead for leniency in this case because of the nature of the case." (Tr. 10).^{*} However, he also brought to the Court's attention a number of facts that might mitigate sentence: the fact that Giambanidis had come from Greece only three years before; the very limited extent of his education; his lack of parents in the United States; and his age—23 at the time of conviction.

Judge Bauman observed that according to the Probation Office report Giambanidis had refused to cooperate with the Government after his arrest, either in recovering the stolen money or in identifying his accomplices. Giambanidis' counsel explained that the defendant was fearful for the safety of his wife if he cooperated. Giambanidis expressed regret for his conduct. Judge Bauman addressed him as follows:

^{*} References prefixed "Tr." refer to the sentencing minutes of April 15, 1974.

THE COURT: Mr. Giambanidis, bank robbery is one of the most serious crimes in the United States and this is not an isolated instance where you made one mistake. This is a situation where time after time after time you committed armed bank robberies.

DEFENDANT GIAMBANIDIS: Yes, sir.

THE COURT: In the course of those armed bank robberies, you stole a great deal of money, and after all that was over, instead of fully cooperating with the government, both as to where the remaining money is and as to who was working with you on these bank robberies, you adopted a position that you are not going to do that.

Silence, in my view, is unacceptable, and bank robbery, in particular, must be dealt with firmly.

Accordingly, the sentence of the Court is, with respect to each count of each indictment to which you have pleaded guilty, that you be committed to the custody of the attorney general for a period of fifteen years. The sentences on each of those counts to run concurrently. (Tr. 11-12).

Youth Corrections Act treatment was never requested by Giambanidis' counsel, nor was the matter raised or referred to in any way during his sentencing. It was mentioned during the sentencing of co-defendant Constantino Christodoulou, which immediately followed. As Judge Bauman noted, Christodoulou's involvement in the bank robberies was "not as serious as Mr. Giambanidis." (Tr. 15). For this reason, and apparently also because Christodoulou had cooperated more fully after his arrest (Tr. 13), Judge Bauman did not feel that Christodoulou was "nearly in the class of Mr. Giambanidis". Christodoulou received concurrent sentences of seven years. (Tr. 15-16). During the sentencing of Christodoulou the following exchange took place:

THE COURT: First the law requires me to indicate I will not treat him as a young adult offender, and the reason should be self-evident. But the law requires me to state them [sic]; namely, that he has been engaged in a life of violent crime of such seriousness that I do not feel that young adult offender treatment would benefit him in any particular a way.

At this point Judge Bauman turned to Giambanidis' attorney and asked:

THE COURT: Your client was not eligible?

MR. PANZER: He was eligible as a young adult.

THE COURT: It only applies to youthful offenders [sic].

The District Court then imposed the seven year sentences on Christodoulou.

ARGUMENT

The District Court Properly Denied The Petitioner's Motion For Collateral Relief.

Giambanidis claims that at the time he was sentenced in 1974 the District Court erred in not considering the possibility of imposing a sentence pursuant to 18 U.S.C. § 5005 *et seq.*, the Youth Corrections Act ("YCA").* He

* Pursuant to the Act a defendant who has not attained the age of twenty-two at the time of conviction is to be sentenced under the Act unless the Court finds he would not benefit from such treatment. Thus, a defendant under twenty-two is presumed to be eligible for the substantial benefits provided by the Act. Title 18, United States Code, Section 4216 provides that a defendant who has attained his twenty-second birthday, but

[Footnote continued on following page]

moves pursuant to 28 U.S.C. § 2255 to have his sentence vacated and the case remanded for resentencing. The District Court's denial of this relief was proper for two distinct reasons: 1) Giambanidis' claim is not cognizable under 28 U.S.C. § 2255, and 2) the claim is in any event without merit because the sentencing judge was under no obligation, in the case of a "young adult offender" such as Giambanidis, to consider the alternative of Youth Corrections Act treatment, without it ever being requested by the defendant.

A. The Defendant's Petition Failed To State A claim that Can Be Raised By A Petition Pursuant To 28 U.S.C. § 2255.

In the circumstances of this case Giambanidis' claim that the District Court was compelled to consider a specific sentencing alternative is not the type of claim cognizable under 28 U.S.C. § 2255. Since Giambanidis has failed to demonstrate that the alleged error resulted in a complete miscarriage of justice, he is not entitled to relief pursuant to 28 U.S.C. § 2255.

In *Stone v. Powell*, 428 U.S. 465, 477, n.10 (1976), the Supreme Court stated:

"Despite the expansion of the scope of the writ, there has been no change in the established rule with respect to nonconstitutional claims. The writ of habeas corpus and its federal counterpart, 28

has not attained his twenty-sixth birthday at the time of conviction may be sentenced pursuant to the Youth Corrections Act if the Court finds that the defendant will benefit from such treatment. Thus, the presumption is reversed—the defendant between the ages of twenty-two and twenty-six is presumed not to be entitled to YCA consideration. Giambanidis was twenty-three at the time of conviction, and was only eligible for sentence under 18 U.S.C. § 4216 as a "young adult offender."

U.S.C. § 2255, 'will not be allowed to do service for an appeal.' *Sunal v. Large*, 332 U.S. 174, 178 (1947). For this reason, nonconstitutional claims that could have been raised on appeal, but were not, may not be asserted in collateral proceedings. *Id.*, at 178-179; *Davis v. United States*, 417 U.S. 333, 345-346, and n.15 (1974). Even those nonconstitutional claims that could not have been asserted on direct appeal can be raised on collateral review only if the alleged error constituted 'a fundamental defect which inherently results in a complete miscarriage of justice,' *id.*, at 346, quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)."

This general rule has been recently reiterated by this Court in *Edwards v. United States*, Dkt. No. 77-2048, slip op. 123, 126-27 (2d Cir. Oct. 25, 1977). See also *Del Vecchio v. United States*, 556 F.2d 106, 110-11 (2d Cir. 1977); *Alfano v. United States*, 555 F.2d 1128, 1130 (2d Cir. 1977).

There plainly was no "miscarriage of justice" in this case. It is a virtual certainty that Judge Bauman *would have* rejected Youth Corrections Act treatment, if in fact he did not.* By his own and his attorney's admissions, Giambanidis had committed ten armed bank robberies over a two year period. Tens of thousands of dollars had been stolen and many lives put in danger. Nor could the robberies in any way be excused as youthful impulses, having consisted in each case of a collaborative venture

* The fact that Youth Corrections Act treatment was not discussed on the record does not, of course, necessarily mean that it was not considered. Giambanidis' age, and therefore his eligibility under 18 U.S.C. § 4216, was made plain to Judge Bauman during the sentencing proceeding. The judge's silence on the record may simply indicate that he rejected Youth Corrections Act treatment out of hand, as well he might have in light of the seriousness of defendant's criminal conduct.

with at least one other co-defendant. Youth Corrections Act treatment would have paved the way for this extensive criminal history to be completely expunged from Giambanidis' record pursuant to 18 U.S.C. § 5021.

The extreme unlikelihood of Judge Bauman's granting Youth Corrections Act treatment to Giambanidis is made clear by his rejection of such treatment in the case of co-defendant Christodoulou, whom he was disposed to treat much more leniently.* Judge Bauman stated that he considered Christodoulou "not nearly in the [same] class" with Giambanidis in terms of criminal involvement, and imposed sentences of only seven as opposed to fifteen years. Moreover, Christodoulou had cooperated with the Government after his arrest and Giambanidis had not.

As noted below, Youth Corrections Act treatment is presumed *not* to be appropriate in the case of a "young adult offender". A review of the facts that were before Judge Bauman, and of his remarks at the sentencing proceeding, compels the conclusion that this presumption could not have been overcome in Judge Bauman's mind. Nor is it likely that it could be overcome in the mind of whatever judge will resentence the defendant if the relief he now seeks is granted.

Moreover, there is simply no justification for Giambanidis' failure to raise this point at an earlier time. He could have raised the issue with Judge Bauman at the time of sentence, or after sentence pursuant to Rule 35, Fed. R. Crim. P. Giambanidis was not precluded from initiating a direct appeal from the conviction alleging the

* Christodoulou's age at the time of conviction is not of record. Judge Bauman's remarks at sentencing indicate that he understood Christodoulou to be a "youth offender." Giambanidis states in his brief that Christodoulou was in fact older than he, (Br. 3); if that is so then Christodoulou was at most a "young adult offender" like Giambanidis.

same claim he now advances. The inability to show just cause for the failure to advance on direct appeal even a constitutional issue can be fatal to a habeas claim. See *Stone v. Powell*, *supra*, at 481-82; *Kaufman v. United States*, 394 U.S. 217, 227 n.8 (1969); *Fay v. Noia*, 372 U.S. 391, 438 (1963). Inevitably, it must be fatal to Giambanidis' nonconstitutional claim. *Stone v. Powell*, *supra*, at 477 n.10; *Davis v. United States*, 417 U.S. 233, 245-47 (1973); *Sunal v. Large*, 332 U.S. 174, 178 (1947).

B. The District Court Was Not Required To Raise Sua Sponte The Possibility Of A Youth Corrections Act Sentence.

Assuming that this Court were to entertain Giambanidis' collateral attack, his claim must be rejected on the merits. The alternative of a Youth Corrections Act sentence was never suggested by Giambanidis' attorney at the time of sentencing, and Judge Bauman was under no obligation to consider such an alternative *sua sponte*.*

In any sentencing proceeding there are a number of alternatives open to the sentencing judge. There is the range of possible terms of imprisonment. There is the choice among parole eligibility statuses—after one third of the term, after a shorter specified period, or immediately. 18 U.S.C. § 4205(a) & (b). There is the possibility of committing the defendant pending further study prior to a final sentencing decision. 18 U.S.C. § 4205(c) & (d). The court may order a competency examination of

* Judge Bauman did spontaneously consider the alternative of Youth Corrections Act treatment in the case of co-defendant Christodoulou, whom he apparently understood to be a "youth offender." If Christodoulou was in fact older than Giambanidis, and therefore at most only a "young adult offender," then Christodoulou received a benefit to which he was not entitled. This does not, of course, affect Giambanidis' rights.

a defendant before proceeding to impose sentence. 18 U.S.C. § 4244. In the case of a defendant who is a narcotics addict, the court may consider whether he is eligible for special rehabilitation treatment under 18 U.S.C. §§ 4251-4255.

Given the range of sentencing alternatives that always exists, it would be an intolerable burden on the sentencing judge to require that he formally take up and reject all possible alternatives without the defendant identifying any particular alternative that he thinks might fit his case.

Such *sua sponte* consideration is not required with respect to any of the sentencing alternatives described above. Defendant's claim that the Court was required *sua sponte* to consider a sentence under the Youth Correction Act is simply inaccurate. Since Giambanidis had attained his twenty-second birthday at the time of conviction—he was twenty-three—he was not entitled to "youth offender" treatment pursuant to 18 U.S.C. § 5005 *et. seq.*; at best he could have been considered a "youth adult offender" pursuant to 18 U.S.C. § 4216.

The rights of a "young adult offender" (age 22-26) in this respect are to be carefully distinguished from those of a "youth offender" (age 18-21). A "youth offender" may be sentenced as an adult only after an express finding that he will not benefit from Youth Correction Act treatment. *Dorszynski v. United States*, 418 U.S. 424 (1974). In the case of a "young adult offender," however, the statutory presumption is reversed. Whereas a "youth offender" may be sentenced *as an adult* only "[i]f the court shall find that [he] will not derive benefit from [YCA] treatment", 18 U.S.C. § 5010(d) (emphasis added), a "young adult offender" may be sentenced *under the YCA* only "if, after taking into consideration [various factors], the court finds that there are reasonable grounds

to believe that the defendant *will* benefit from [YCA] treatment." 18 U.S.C. § 4216 (emphasis added).

The legislative history of the "young adult offender" provision also makes clear that, unlike the "youth offender", the "young adult offender" is presumed *not* to be a candidate for YCA treatment:

The proposed legislation [§ 4216] authorizes the court, *in exceptional cases* of defendants between the ages of 22 and 26 years at time of conviction, to sentence under the provisions of the Federal Youth Corrections Act. . . . [It] contemplates that the Youth Act may be applicable to an offender in the slightly older age group *only when the court makes a special finding* that the defendant would benefit by the treatment methods prescribed by that act.

S. Rep. No. 2013, 85th Cong., 2d Sess., (1957), 1958 U.S. Code Congressional & Administrative News 3891, 3892 (emphasis added).

Consistent with the language and history of the statute, the courts have made clear that there is no requirement of an express "no benefit" finding before a "young adult offender" is sentenced as an adult. See *United States v. Negron*, 548 F.2d 1085, 1087 (2d Cir. 1977); *United States v. Cruz*, 523 F.2d 473 (9th Cir. 1975), *cert. denied*, 423 U.S. 1060 (1976); *United States v. Schwarz*, 500 F.2d 1350, 1352 (2d Cir. 1974); *United States v. Kaylor*, 491 F.2d 1133, 1137 (2d Cir.), *vacated*, 418 U.S. 909 (1974). See also *United States v. Waters*, 437 F.2d 722, 723 (D.C. Cir. 1970); *Stead v. United States*, 395 F. Supp. 1299, 1300 (E.D. Mo., 1975), *affirmed*, 531 F.2d 872 (8th Cir. 1976); *Marshall v. United States*, 389 F. Supp. 729 (E.D. Wis. 1975), *affirmed*, 495 F.2d 1175 (7th Cir. 1974). On the contrary, a "young adult offender" *must* be sentenced as an adult unless there is an express finding that he *will* benefit from a Youth Corrections Act sentence. *United States v. Torun*, 537 F.2d 661, 664-65 (2d Cir. 1976).

There is no general requirement that particular sentencing alternatives be taken up and expressly considered by a sentencing judge *sua sponte*. Least of all should there be such a requirement in the case of Youth Corrections Act treatment for a "young adult offender," an alternative that is presumed *not* to be appropriate unless the sentencing judge affirmatively makes certain findings. Giambanidis is therefore barred by his failure ever to request Youth Corrections Act treatment, even assuming that the claim he now makes is cognizable under 28 U.S.C. § 2255.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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Form 280 A. - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

DAVID C. PATTERSON, being duly sworn
deposes and says that he (~~she~~) is employed in the office of the
United States Attorney for the Southern District of New York.

Stating also that on the 23rd day of December, 1977,
he (~~she~~) served ^{two} ~~a~~ copy of the within brief
by placing the same in a properly postpaid franked envelope
addressed:

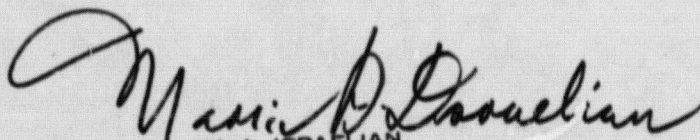
Vasilios Giambanidis
P.O. Box 1000
Lewisburg, Pa. 17837

And deponent further says that he (~~she~~) sealed the said envelope
and placed the same in the mailbox for mailing at the United
States Attorney's Office, Southern District of New York, One
St. Andrew's Plaza, New York, N.Y. 10007, in the Borough of
Manhattan, City of New York.

David Patterson

Sworn to me before this

23rd day of December, 1977.


MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978